

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:LAD:LA:TL-N-5402-00
KHAnkeny

date: September 25, 2000

to: John L. Zirhut
Team Coordinator LMSB 1222

from: District Counsel, Los Angeles District, Los Angeles

subject: [REDACTED]
Extending Period of Limitations for [REDACTED], [REDACTED], and [REDACTED] Years

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

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ISSUE

For the [REDACTED], [REDACTED], and [REDACTED] tax years, which entity is the proper party to sign the Form 872 (Consent to Extend the Time to Assess Tax) to extend the time to assess the income tax liability of [REDACTED]?

CONCLUSION

[REDACTED] should sign the Form 872 for the consolidated group. On the first page, the taxpayer's name should be:

[REDACTED] (EIN [REDACTED]), as successor in interest to [REDACTED] ([insert EIN]), which in turn was successor in interest to [REDACTED] (EIN [REDACTED]), and as alternative agent under Temp. Reg. § 1.1502-77T for the members of the [REDACTED] (EIN [REDACTED]) consolidated group.*

* This is with respect to the consolidated income tax liability of [REDACTED] (EIN [REDACTED]) [REDACTED] for the tax years ending [REDACTED], [REDACTED], and [REDACTED].

On the second page, the corporate name should be:

[REDACTED] (EIN [REDACTED])

Its president, vice president, treasurer, assistant treasurer, chief accounting officer, or any other current officer duly authorized to act may sign the Form 872 on its behalf.

FACTS

For the [REDACTED], [REDACTED], and [REDACTED] tax years, [REDACTED] filed consolidated income tax returns on behalf of itself and its subsidiaries.

On [REDACTED], [REDACTED] (EIN [REDACTED]) merged into [REDACTED] pursuant to section 368(a)(1)(A). On [REDACTED], [REDACTED] merged into [REDACTED] (EIN [REDACTED]) pursuant to section 368(a)(1)(A). [REDACTED] and [REDACTED] no longer exist.

The taxpayer is providing written confirmation about these facts and this characterization of the reorganizations. You have also confirmed these facts with the Delaware Secretary of State, where [REDACTED] and [REDACTED] were incorporated and [REDACTED] is incorporated.

DISCUSSION

Generally, the common parent is the exclusive agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having also been given or executed by each such subsidiary. Id.

However, [REDACTED] cannot be the exclusive agent under Treas. Reg. § 1.1502-77(a) because it is no longer the common parent. On [REDACTED], when it merged into [REDACTED], which was the surviving corporation, [REDACTED] ceased to exist.

Temp. Reg. § 1.1502-77T, which was promulgated in 1988 to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). When a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group for purposes of mailing notices of deficiency and for executing waivers of the period of limitations. Under Temp. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as alternative agents for the group:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which § 381(a) applies,

(iii) The agent designated by the group under section 1.1502-77(d), or

(iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Temp. Reg. § 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. § 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. § 1.1502-77T.

Subparagraph (i) does not apply because [REDACTED]
[REDACTED] no longer exists.

However, subparagraph (ii) does apply. Subparagraph (ii) provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381(a)(2) concerns a transfer in connection with a reorganization, which includes a statutory merger described in section 368(a)(1)(A). [REDACTED] is the successor to [REDACTED], which in turn was the successor to [REDACTED], pursuant to section 368(a)(1)(A) statutory mergers.

Subparagraph (iii) provides that the agent designated by the group under Treas. Reg. § 1.1502-77(d) is an alternative agent. It is inapplicable because [REDACTED] did not dissolve or contemplated dissolution, contrary to the requirement of Treas. Reg. § 1.1502-77(d).

Finally, according to subparagraph (iv), if under Treas. Reg. § 1.1502-75(d)(2) or (3) the group remains in existence following a mere change in identity, a transfer of assets to a subsidiary, or a reverse acquisition, then the common parent of the group at the time the waiver is given is an alternative agent. A reverse acquisition occurs when the shareholders of the acquired corporation receive more than 50% of the stock of the acquiring corporation. Treas. Reg. § 1.1502-75(d)(3). There are no facts indicating whether these reorganizations were reverse acquisitions. However, even if these were reverse acquisitions, we would reach that same conclusion. [REDACTED], which is the common parent of the group at the time the Form 872 will be signed, may act as the agent of the consolidated group.

In summary, [REDACTED] is a successor and is an "alternative agent" under subparagraph (i) of Temp. Reg. § 1.1502-77T(a)(4). Therefore, [REDACTED] should sign the Form 872 for the [REDACTED], [REDACTED], and [REDACTED] tax years.

On the first page of the draft Form 872 attached to your memorandum, you have identified the taxpayer as:

[REDACTED] (EIN [REDACTED]) as Successor in
Interest to [REDACTED] (EIN [REDACTED])
[REDACTED].

We recommend instead that the taxpayer's name be stated as:

[REDACTED] (EIN [REDACTED]), as successor in interest to [REDACTED] ([insert EIN]), which in turn was successor in interest to [REDACTED] (EIN [REDACTED]), and as alternative agent under Temp. Reg. § 1.1502-77T for the members of the [REDACTED] (EIN [REDACTED]) consolidated group.*

On the bottom of the first page of the Form 872 there should be an asterisk followed by: "This is with respect to the consolidated income tax liability of [REDACTED] (EIN [REDACTED]) [REDACTED] for the tax years ending [REDACTED], [REDACTED], and [REDACTED]."

On the second page of the draft Form 872 attached to your memorandum, you have identified the corporate name as:

[REDACTED] as Successor in Interest to [REDACTED]

We recommend instead that the corporate name be:

[REDACTED] (EIN [REDACTED])

We recommend that you confirm that the names used on the Form 872 are precisely as stated in tax returns, copies of which were not attached to your memorandum. We could not determine, for example, whether the name of the parent corporation is "[REDACTED]" as stated in your memorandum or is "[REDACTED]" as stated in the draft Form 872. We also recommend, if you have not already done so, that you confirm with the Delaware Secretary of State that [REDACTED] (EIN [REDACTED]) still exists and is the common parent of the consolidated group.

The Form 872 should be signed by a current, duly authorized officer of [REDACTED] I.R.C. §§ 6061(a), 6062; Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. After the signature line, the name of the signatory and his title should be typed in.

The best practice would be to obtain [REDACTED]'s latest bylaws and most recent corporate minutes to determine the identity of its current officers. If you have insufficient time to do that, we recommend that you obtain a

written verification from [REDACTED] that the signatory is a current officer of [REDACTED], authorized to sign the Form 872 on its behalf.

Finally, you attached a draft of Form Letter 907(DO) (Rev. 2-2000), notifying [REDACTED] of its right to refuse or to limit the extension of the period of limitations. You are required to include this notification. Section 6501(c)(4)(B) provides that "[t]he Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent."

In accordance with CCDM(35)3(19)4, we are furnishing a copy of this advisory opinion applying well-settled principles of law to the Assistant Chief Counsel (Field Service) for 10-day, post-issuance review. We will let you know whether the Assistant Chief Counsel agrees with this advise. Please call me at 213-894-3027, ext. 155, if you have any questions.

JAMES A. NELSON
District Counsel

By: _____

KATHERINE H. ANKENY
Attorney